92-646

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUIS PULIDO,
Defendant - Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To
The Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Mike DeGeurin, FBN 2558
909 Fannin , Suite 590
Houston, Texas 77010
(713) 655-9000

Attorney for Petitioner

Alpha Law Brief Co.* 6113 Aletha Lane* Houston, Texas 77081 (713)981-9000

QUESTION PRESENTED

Whether, under *Murray v. United States*, 487 U.S. 533 (1988), the Government has the burden of establishing that a magistrate's decision to issue a search warrant was not affected by information within a warrant affidavit which was obtained illegally by the police.

LIST OF ALL PARTIES

1. Luis Pulido, Defendant-Petitioner.

2. The United States of America, Plaintiff-Respondent.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

LOWER COURT'S OPINION 1

BASIS FOR JURISDICTION 2

CONSTITUTIONAL PROVISION RELIED UPON . 2

STATEMENT OF THE CASE 2

THE FEDERAL COURT JURISDICTION 4

REASONS FOR REVIEW 5

A. The *MURRAY* ISSUE IN THIS CAUSE . 6

B. THE *FRANKS-MURRAY* DICHOTOMY 10

C. POLICY FAVORING THE DISTRICT COURT'S VIEW 14

CONCLUSION 21

APPENDIX A - OPINION OF THE COURT OF APPEALS 1a

APPENDIX B - DISTRICT COURT'S ORIGINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW 1a

APPENDIX C - DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND 1a

TABLE OF AUTHORITIES

CASES

Chapman v. California,
386 U.S. 18 (1967) 15, 21

Franks v. Delaware,
438 U.S. 154 (1978) . . . . . passim

Illinois v. Gates,
462 U.S. 213 (1983) 9

Murray v. United States
487 U.S. 533 (1988) . . . . . passim

Nix v. Williams,
467 U.S. 431 (1984) 19-21

Satterwhite v. Texas,
486 U.S. 249 (1988) 15

Segura v. United States,
468 U.S. 796 (1984) 10, 21

United States v. Anderson,
933 F.2d 612 (8th Cir. 1991) 9

United States v. Antone,
753 F.2d 1301 (5th Cir. 1985) 10

United States v. Gillenwaters,
890 F.2d 679 (4th Cir. 1989) 11, 12, 19

United States v. Halliman,
923 F.2d 873 (D.C. Cir. 1991) 11, 17, 18

United States v. Herrold,
962 F.2d 1131 (3rd Cir. 1992) . . . 10, 11, 13, 16, 19

United States v. Karo,
468 U.S. 705 (1984) 10

United States v. Leon,
468 U.S. 897 (1984) 18, 19

United States v. Mulder,
889 F.2d 239 (9th Cir. 1989) 9, 12-14, 18

United States v. Salas,
879 F.2d 530 (9th Cir. 1989), *cert. denied*
493 U.S. 979 (1989) 13

United States v. Straughter,
950 F.2d 1223 (6th Cir. 1991), *cert. denied*
112 S.Ct. 1505 (1992) 7

United States v. Vasey,
834 F.2d 782 (9th Cir. 1987) 12, 13

United States v. Veillette,
778 F.2d 899 (1st Cir. 1985), *cert. denied*
476 U.S. 1115 (1986) 10

Wong Sun v. United States,
371 U.S. 471 (1963) 11

STATUTES

18 U.S.C. § 841 4

18 U.S.C. § 846 4

18 U.S.C. § 3731 5

28 U.S.C. § 1254(1) 2

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUIS PULIDO,
Defendant-Petitioner,

V.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

COMES NOW LUIS PULIDO, Petitioner herein, by and through his attorney, **Mike DeGeurin**, and pursuant to Rule 12, files this petition for writ of certiorari and in support thereof, would show the Court as follows:

LOWER COURT'S OPINION

The opinion of the Court of Appeals for the Fifth Circuit is published at 966 F.2d 964.

BASIS FOR JURISDICTION

A. The opinion of the Court of Appeals was delivered on July 21, 1992. The judgment of the Court of Appeals issued the same date.

B. No motion for rehearing was filed.

C. Petitioner asks this Court to review a final judgment of a court of appeals of the United States. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

D. This petition is timely if filed on or before October 19, 1992.

CONSTITUTIONAL PROVISION RELIED UPON

The Fourth Amendment to the United States Constitution reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Federal customs agents received information concerning suspected narcotics activity at a house in Houston, Texas. While conducting surveillance of the house, the agents saw Cesar Restrepo leave the house and drive to a second house where he picked up the petitioner, Luis Pulido. The men drove around, stopping a few times to

engage in activities which the agents considered suspicious. After Pulido was dropped off at the second house, the agents detained Restrepo and searched the car. They then returned to the second house. Although a woman who came to the door denied them entry, the officers entered and searched the house in a purported "protective sweep," finding the petitioner in a bathroom. The officers detained the petitioner, the woman, and her children for several hours while they obtained a search warrant for both houses, plus a third location, from a federal magistrate. The warrant affidavit included information obtained by observations made during the nonconsensual entry. A search pursuant to that warrant revealed certain items believed to constitute evidence that the petitioner and Restrepo distributed cocaine.

The United States District Court for the Southern District of Texas, Houston Division, granted the petitioner's motion to suppress any evidence found at the second house. The district court judge reasoned that the portions of the warrant affidavit which stemmed from the illegal nonconsensual search could be isolated, but *Murray v. United States*, 487 U.S. 533 (1988), also required the Government to demonstrate that the tainted potion of the affidavit did not affect the magistrate's decision to issue the warrant. This the Government failed to do, the district court reasoned, in that there was no evidence that the magistrate ignored the tainted portion.

The Government appealed the district court's ruling, as well as appealing the ruling on a motion by codefendant Restrepo. A panel of the Court of Appeals for the Fifth Circuit reversed the district court's decision. *United States v. Restrepo*, 966 F.2d 964 (5th Cir. 1992). The Fifth Circuit concluded that the district court's reliance on an "unfortunate sentence fragment" in *Murray* was unsound because this Court "almost certainly" could not have meant what it

literally said. 966 F.2d, at 970. Rather, the Fifth Circuit held, this Court intended nothing more than to ratify the view taken in several circuits that a review of a theoretically expurgated affidavit, comparable to the method adopted in *Franks v. Delaware*, 438 U.S. 154 (1978), was a sufficient remedy.[1] The petitioner respectfully submits that *Murray* means what it says. If not, only this Court has the authority to say so.

The trial court promptly filed additional findings of fact and conclusions of law upon remand, as directed by the Fifth Circuit, despite the petitioner's request that the trial court continue proceedings while the petitioner prepared a petition for writ of certiorari. In the additional findings, filed on September 17, 1992, the trial court addressed another aspect of *Murray* by finding that the officers' decision to seek a warrant was not "prompted" by the information discovered in the warrantless entry. The petitioner actually disagrees with that in some respects, but what is most important here is that the trial court's additional findings make the interpretation of the *Murray* language even more critical in this cause.

THE FEDERAL COURT JURISDICTION

The United States District Court had jurisdiction over the indictment, which accused the petitioner, in two counts, of violating 18 U.S.C. §§ 841 and 846. Upon the granting

---

1. Just in case it was wrong, however, the Fifth Circuit further opined that the *Murray* passage in question constituted dictum. 966 F.2d, at 970, n. 13. For good measure, the Fifth Circuit commented that *Murray* was "a four-three decision." 966 F.2d, at 969. Indeed it was, but as the petitioner reads the *Murray* dissents, it would appear that the dissenters would favor the petitioner's position even more strongly than the justices joining the plurality opinion.

of the suppression motion by the district court and the Government's timely appeal thereof, the Court of Appeals had jurisdiction under the second paragraph of 18 U.S.C. §3731.

REASONS FOR REVIEW

The question presented is the meaning of this Court's statement in *Murray, supra* at 542:

> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, *or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant* (emphasis added).

Assuming, as the district court now has held, that the Government agents' decision to seek the warrant was not "prompted" by what they saw during the illegal entry, this cause squarely presents the question of what this Court meant in the language italicized in the excerpt above.[2] The petitioner believes the district court's interpretation of the

---

2. The district court recognized what some other courts appear not to have grasped: the "prompting" issue and the "effect on magistrate's decision" issue are two distinct questions under *Murray*. While a finding that the illegally obtained evidence *did* prompt officers to seek the warrant would obviate the need for an inquiry into effect on the magistrate's decision, a finding that it did *not* prompt the request would *not* automatically mean that the magistrate ignored the illegally obtained information presented in the affidavit.

language was correct and urges this Court to reject the approach taken by the Fifth Circuit.

A. THE *MURRAY* ISSUE IN THIS CAUSE

The basic facts shown by the suppression hearing evidence are set forth in the Fifth Circuit's opinion. 966 F.2d, at 966-968. Briefly summarized, the evidence showed that federal customs officers, working in conjunction with the Houston Police, conducted a surveillance of the petitioner and Mr. Restrepo on July 3, 1991. The officers saw Restrepo drive to 7254 Regency Square Court and pick up the petitioner. Together the petitioner and Restrepo drove out Westheimer Road (a major thoroughfare) into far west Houston, stopping a few times for the petitioner to use a pay phone. This was suspicious, according to the officers, because there was a cellular telephone in the automobile. On their return trip Restrepo and the petitioner stopped at a video store and a Home Depot store.

After the petitioner was dropped off and Restrepo drove away, the officers followed Restrepo to a donut shop, where they confronted him. Restrepo acquiesced in the search of the car, though he declined to sign a written consent because he only had borrowed the car and did not believe he had authority to consent. Among other things found by the officers was a wallet which they had seen in the petitioner's possession during the earlier surveillance. A dog trained to identify the smell of cocaine "alerted" on the wallet, though no contraband was found in the wallet or anywhere in the car. Restrepo was arrested.

The agents then returned to the Regency Square Court address and knocked at the door, whereupon Ms. Mayra Cata Garcia came to the door. The agents believed she was lying when she said that she and her children were the only people

in the residence. Ms. Garcia declined the officers' request that she consent to their entry, but the officers entered anyway. The petitioner was found in the bathroom. He was taken to the living room where he, Ms. Garcia, and the children were required to wait for several hours while the officers went to seek a warrant from a federal magistrate.

The warrant affidavit disclosed that the officers had entered without consent at the petitioner's home, but it went on to state that the officers found the petitioner "hiding" in the bathroom. It also disclosed that the petitioner who the agents then believed to be named Antonio Narvaez Del Rio, had given the name "Luis Pulido." A federal magistrate, Hon. Frances Stacy, signed the warrant. The officers then utilized the warrant to engage in a more thorough search at the Regency Square Court address, which revealed *inter alia* documents (including purported "drug ledgers" which were shredded), a large amount of currency, and other items of evidentiary value.[3]

This is not a case like *United States v. Straughter*, 950 F.2d 1223 (6th Cir. 1991), *cert. denied* 112 S.Ct. 1505 (1992), where the district court was able to find that "the judge issued the search warrants ... without knowledge of ... information obtained during the initial entry." On the contrary, the tainted material unquestionably was before the magistrate. In this cause the district court recognized that the portions of the affidavit which flowed from the illegal

---

3. The Government's Response to Defendant's Motion to Suppress, page 10, which was filed in the district court on September 5, 1991, alleges that "the documents seized from Regency Square Court show the distribution of at least 48 kilograms of cocaine for a minimum total value of $402,500.00." The petitioner disagrees that the documents prove any such thing, but this statement by the Government demonstrates the potential importance of this evidence.

conduct could be identified and isolated.[4] *See*, District Court Conclusions of Law, Nos. 9-11. Nevertheless, the district court reasoned that there was no showing that the magistrate in fact had engaged in any such process of weeding out the improper material. The district court believed that this was a burden falling upon the Government under the language from *Murray* concerning the possibility that the illegally obtained evidence affected the magistrate's decision to issue the warrant. Absent such evidence, the district court "assume[d] that Judge Stacy relied upon the entire affidavit in making the decision to sign the search warrant." District Court Conclusions of Law, No. 11.

The district court understood the reality of what normally happens when a magistrate reviews warrant affidavits. That reality also was recognized in an Eighth Circuit case where the shoe was on the other foot and a defendant was urging the reviewing court to view an affidavit in pieces rather than as a whole:

> ...the magistrate judge does not make a determination of probable cause by examining the affidavit's paragraphs individually; instead, the magistrate judge is "to make a

---

4. In the supplemental findings of September 17, the district court took a narrow view of what those "fruits" of the illegal search were. The district court found that only the name "Luis Pulido" and the fact of the petitioner's presence were obtained illegally. Actually there was more: (1) observations leading to the conclusion that the petitioner was "hiding," (2) the agents' belief that the petitioner was using more than one name (regardless of which name was correct), and (3) the fact that cocaine apparently was *not* being stored at the Regency Square Court address, which was vital for the justification of a search at the other addresses. Furthermore, the information was calculated to convey a sense of urgency to the magistrate, which in a close call could make the magistrate lean toward issuing the warrant.

> practical, common-sense decision whether, given *all* the circumstances set forth in the affidavit before him ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) (emphasis added). Consequently, the affidavit cannot be attacked paragraph by paragraph; it must be evaluated as a whole. *United States v. Anderson*, 933 F.2d 612, 614 (8th Cir. 1991).

Here, on the other hand, it is the Government contending that particular parts of the affidavit should be treated as if they were isolated and ignored by the magistrate, but the reasoning in *Anderson* still applies. If the magistrate did isolate and ignore the illegal matters, there is no evidence of that occurring, such as a strike-out or other notation on the affidavit or warrant. Nor was there a specific request by the Government agents that the illegally obtained information be disregarded, such as occurred in *United States v. Mulder*, 889 F.2d 239, 242 (9th Cir. 1989). Given the inherent limitations of an *ex parte* warrant proceeding, as discussed in *Franks, supra* at 169, it is unrealistic to think a magistrate even has a good opportunity to weed out illegally obtained matter in an affidavit. Furthermore in this cause it cannot be assumed that the magistrate assigned no weight to the improper matter in the affidavit flowing from the illegal search, as it was the only information pertaining to what actually was observed within the Regency Square premises.

The underlying question here is whether the constitutional rights guaranteed by the Fourth Amendment are adequately protected by the legal fiction adopted by the Fifth Circuit, built on an analogy to *Franks v. Delaware*,

supra, or whether *Murray* creates an additional safeguard. This Court used a *Franks*-style methodology in *United States v. Karo*, 468 U.S. 705, 719 (1984), but the suitability of that method was not the central issue in *Karo*, and *Karo* preceded *Murray*. Nor was the present issue before the Court in *Segura v. United States*, 468 U.S. 796, 813-815 (1984), where "[n]one of the information on which the warrant was secured was derived from or related in any way to the initial entry into [Segura's] apartment," and the risk of a magistrate's reliance on improperly obtained information was nil. Therefore, what this Court meant in *Murray* is the crux of the issue.

B. THE *FRANKS-MURRAY* DICHOTOMY

Franks v. Delaware held that a defendant was entitled to challenge those portions of a warrant affidavit which were false and had been purposefully or recklessly misstated. The remedy adopted in *Franks* was a two-step analytical process, consisting of (1) exclusion of the tainted portion (or portions) of the affidavit, and (2) review of the remaining text of the affidavit to determine whether it presented facts constituting probable cause. In this cause the Court of Appeals followed earlier decisions in *United States v. Antone*, 753 F.2d 1301 (5th Cir. 1985) and *United States v. Veillette*, 778 F.2d 899 (1st Cir. 1985), *cert. denied* 476 U.S. 1115 (1986) in concluding that a *Franks*-style solution was appropriate: strike out the information in the affidavit which was obtained illegally, then analyze the remainder to determine whether that presented probable cause. Of course both of those cases preceded *Murray*.[5] The Fifth Circuit also cited *United States v. Herrold*, 962 F.2d 1131, 1141 (3rd Cir. 1992), which held that "the Court's use of 'affect' in *Murray* must

---

5. The Fifth Circuit also did not mention the vigorous dissent in *Veillette*.

be understood to signify affect in a substantive manner." It is a little hard to argue with a statement as nebulous as that, but the petitioner respectfully suggests that an *actual* effect is "substantive," or more to the point, *substantial*.[6] *Herrold* relied in part on pre-*Murray* cases but also cited *United States v. Gillenwaters*, 890 F.2d 679 (4th Cir. 1989) and *United States v. Halliman*, 923 F.2d 873 (D.C. Cir. 1991). Those cases will be discussed further *infra*.

There is some facial appeal to such parallel reasoning between a *Franks* situation and a *Murray* situation, but it fades upon closer scrutiny. To begin with, it is wise to remember the genesis of the *Franks* remedy. Far from setting forth either caselaw precedent or reasons grounded in policy, this Court relied on the fact that Franks' counsel *conceded* the appropriateness of the remedy. 438 U.S., at 172, n. 8.[7] Not since the days of Catherine the Great has so much been given up without a fight. The petitioner here does not concede that a *Franks*-type remedy is appropriate. On the contrary, the petitioner believes such a remedy fails to take into account the realities of the process whereby a magistrate issues a warrant.

The petitioner is not complaining about *Franks* itself. On the contrary, it has a place in cases of this type. A *Franks*-type analysis is a useful tool to determine whether a magistrate even *could* legitimately issue a warrant without considering tainted evidence, but it is not a sufficient solution

---

6. The very fact that such embellishments are urged as something that "must be understood" in itself suggests the need for this Court to address the point.

7. The statement in *Gillenwaters, supra* at 681 that the *Franks* remedy was "essentially an extrapolation from the Court's holding in *Wong Sun v. United States*, 371 U.S. 471 (1963) ..." is *not* an accurate reading of *Franks*.

by itself, because it does not shed light on what the magistrate *actually did* in a particular instance. The additional factor stated in *Murray* must be considered in determining what really occurred. The petitioner, like the district court, reads *Murray* as an improvement on *Franks*.

There is a crucial difference between the use of false statements to fill in gaps in the actual evidence (the *Franks* situation) and the use of illegally obtained evidence. The *Franks* situation is reprehensible due to the reckless or deliberate presentation of a falsehood by the police. Nevertheless, the falsehood itself intrudes on no interest of a particular individual which is protected by the Constitution. The constitutional issue arises only because of the impact of the falsehood on the warrant clause of the Fourth Amendment. 438 U.S., at 164-165. The situation in this cause, like the situation in *Murray*, amounts to *compounding one constitutional violation with another*. First a constitutionally improper warrantless intrusion occurs. Then its effect is magnified if a magistrate who issues a warrant relies on the fruits of that unconstitutional intrusion. Thus, whatever the merits of the *Franks* remedy in a *Franks* context, it does not follow that it is an adequate remedy in the *Murray* context. *Gillenwaters, supra* at 681 intimated that a single constitutional violation of the *Franks* variety is worse than the double-barreled violation at issue here. The petitioner disagrees.

In this cause the Court of Appeals treated the "effect" factor in *Murray* as lacking any value on its own, but at least one other federal appellate court attaches significance to the "effect" language. Although prior to *Murray* the Ninth Circuit had resorted to the "excise the tainted evidence" approach in such cases as *United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987), the language in *Murray* led to the following analysis in *United States v. Mulder, supra* at 242:

> Mulder also argues that the search was illegal because the affidavit supporting the request for a search warrant informed the magistrate of the results of the earlier warrantless testing and so prejudiced the magistrate's judgment. Mulder bases this argument on the statement in *Murray* that it is critical whether "information obtained during that [first illegal] entry was presented to the Magistrate *and* affected his judgment." 108 S.Ct. at 2535 (emphasis added [in *Mulder*]). Mulder assumes that the presence of the first factor -- presentation of the information from the first search -- automatically implicates the second -- the judgment of the magistrate. We have found this assumption to be false.

Mulder was not acknowledged by the Fifth Circuit's opinion.[8] The petitioner here is not trying to push the point as far as Mulder attempted. What matters here is that the Ninth Circuit recognized "effect on the magistrate's judgment" as a discrete factor to be considered. Conceding that the existence of the second factor, i.e. "effect," cannot be assumed, the petitioner nevertheless thinks the recognition of the second factor is a great jurisprudential improvement over the fiction that the first factor does not exist either.

---

8. *Herrold, supra* cited *Vasey, supra* and *United States v. Salas*, 879 F.2d 530 (9th Cir. 1989), *cert. denied* 493 U.S. 979 (1989), but not the more recent *Mulder* case. Actually *Salas* is analytically consistent with *Mulder*, stating that "the [*Murray*] Court commented that where tainted evidence was presented to a magistrate, the warrant would be invalid if the fruit of the illegal conduct affected the decision to issue it." 879 F.2d, at 539. There just happened to be sufficient evidence in *Salas* showing that reliance by the magistrate was not a problem.

Mulder concluded with a sentence which arguably suggests that the burden of proof could fall upon the defendant: "Nothing in the record supports Mulder's claim that the information of the prior search did in fact affect the magistrate's decision." *Id.*, at 242. That assignment of the burden would be incorrect, the petitioner believes, for the reasons discussed in Part C below.

C. POLICY FAVORING THE DISTRICT COURT'S VIEW

The text of the Fourth Amendment itself does not provide clear guidance as to how this matter should be resolved. The petitioner and the district court are of the view that the explicit language of *Murray* is decisive, but the Fifth Circuit took a different view of what that language meant. As is so often the case, the resolution of the issue comes down to an examination of the policies underlying the Fourth Amendment and this Court's applicable caselaw, particularly that dealing with the enforcement mechanism commonly called the "exclusionary rule." Without attempting to fully develop these considerations as could be done in a brief if the writ of certiorari is granted, the petitioner will briefly outline the key reasons why *Murray* should be recognized as placing a burden of proof on the Government to show a lack of an actual effect on the magistrate's decision to issue a warrant:

1. The beneficiary of the constitutional violation, i.e. the Government, should bear the burden of showing a lack of "harm" from the constitutional violation.

2. The burden is an easy one to meet in terms of evidence, if the improper effect did not occur.

3. Taking the burden off the Government would nullify any prophylactic value in *Murray*.

4. Placing the burden on the Government would not overcompensate for the constitutional violation.

These considerations are discussed in turn below.

1. Consistency With "Harmless Error" Analysis

When trial error, such as an incorrect ruling admitting evidence, occurs, it is the Government's burden, as beneficiary of the error, to demonstrate a lack of harm from the error. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Satterwhite v. Texas*, 486 U.S. 249, 257 (1988). "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonably doubt." *Chapman, supra*. Since a suppression motion really is just a form of objection to evidence, it should be the Government's burden to show that all constitutional violations at issue in a suppression motion had no harmful effect. That cannot be done by categorically disregarding potential vectors of the harm. As this Court has recognized many times before, the conduct of the police before trial often is more important, and more hazardous to constitutional rights, than the formal process of introducing evidence at the trial.

The Fifth Circuit's view rests implicitly on a triple assumption: (1) a magistrate reads different parts of an affidavit discretely, (2) he has an opinion as to whether something less than the whole affidavit could stand alone, and (3) that opinion is the same as his opinion as to the adequacy of the affidavit as a whole. As has been suggested

earlier, all three assumptions are tenuous. In reality, a magistrate is apt to read the affidavit as a whole, rather than reflecting on its parts. One could postulate a hypothetical colloquy between officer and magistrate as to the parts of the affidavit in various combinations other than the entirety appearing on the face of the paper, but the petitioner thinks it fair to assume that such situations are few and far between. Far more common would be a perfunctory meeting at which a magistrate gave the affidavit a quick reading, often with either the circumstances of the meeting or the content of the affidavit (or both) conveying the message that "time is of the essence." Further, if a magistrate even had an opinion as to the adequacy of some subset of affidavit facts, it still seems logical that he would find more facts, as opposed to fewer facts, more convincing (even if for no other reason than the enhanced appearance of thoroughness in investigation). That scenario obviously benefits the Government; a defense attorney is nowhere to be seen. Since a *Franks*-type remedy, without more, would rest on a shaky analytical tripod, it is appropriate to place a burden on the Government to show that what really happened did not compromise the validity of the warrant process.

2. Ease of Meeting the Burden

Assuming arguendo that the decision of the magistrate who issued the warrant was not affected, that should be an easy thing for the Government to prove. A few lines of testimony from the magistrate at the suppression hearing would suffice.[9] What the Government has to fear is that a

---

9. For some reason, *Herrold*, *supra* at 1143 dreaded that proposition: "The government was not required to make such a showing which probably could have been made only by producing the justice as a witness so that he could be asked to reconstruct his state of mind when he issued the warrant." Actually the factual inquiry would be simple:

magistrate would state that he or she did in a particular case what magistrates presumably do in general: reading the affidavit as a whole.

The petitioner realizes that one practical effect of the petitioner's position would be to put magistrates on the lookout for improper investigative techniques used in gathering warrant information, given the likelihood of a question on the topic arising at a suppression hearing. That cannot be a bad thing.

Of course it would not always be the case that testimony from the magistrate would be necessary. *Halliman, supra* illustrates a situation where a reviewing court could find with confidence from other evidence that the illegally obtained information did not affect the issuing magistrate's decision. In *Halliman* it was shown that the magistrate simultaneously considered affidavits for three other motel rooms besides the affidavit for the room named in the challenged affidavit, and "the information supporting the warrants for those rooms would have supported an additional warrant for room 900." *Id.*, at 881. Perhaps equally important is that the district court in *Halliman* specifically found a lack of effect, though that was clouded somewhat by an ambiguous reference to "an objective

---

Did the magistrate act on the basis of the entire affidavit, or did he or she mince the affidavit to identify potential legal problems with particular parts of the warrant? Recalling such an event should not be difficult. *Herrold, supra* added that the Government's burden was only to "establish that a neutral justice would have issued a warrant based on the untainted information," apparently reading "neutral" to mean "hypothetical." The petitioner thinks a "neutral magistrate" means an actual magistrate who is neutral in her decisions, not a theoretical review which neutralizes the actual decisions of the magistrate.

standard." *Id.*, at 880.[10] Similarly, the specific request by the police in *Mulder, supra* that certain matter not be considered readily supports a finding of no effect in that case. In short, placing an evidentiary burden on the Government to meet the second *Murray* factor would not be onerous or unfair.

3. Prophylactic Value of *Murray*

The policy basis for the "exclusionary rule" always has been that exclusion of evidence serves the prophylactic function of discouraging illegal conduct by the police, and it does so much more effectively than such alternatives as filing civil lawsuits against the police or voting against the local politicians. The idea is not merely to prevent overbearing police conduct in one case, but to make the consequences sufficiently painful to leave a lasting impression.

In *United States v. Leon*, 468 U.S. 897 (1984), this Court recognized a "good faith" exception to the requirement of a valid warrant largely on the basis that the application of the exclusionary rule would not serve to deter any illegal police activity. Since the officers executing the warrant were not aware of the latent problem, *Leon* reasoned, there was no reason to find the type of deliberate misconduct which application of an exclusionary rule would help deter. This cause presents the extreme opposite end of the spectrum. While well-intentioned officers, acting under an "objectively reasonable" reliance on a warrant, apparently were blindsided by the warrant affidavit's defects in *Leon*, here officers intentionally took the fruits of their flagrant misconduct and

---

10. The lower court's ruling in *Halliman* did not produce a published opinion. Fortunately the appellate author of *Halliman* was the newest member of this Court, Justice Clarence Thomas, so some additional insight into *Halliman* is available to this Court if that matters.

consciously tainted the warrant process. The agents' conduct here was not "objectively reasonable;" it was outrageous. Wrapping the impropriety in a warrant does not cure the impropriety. If anything, such a maneuver makes matters worse by contaminating the desirable practice of reliance on warrants.

If prophylactic considerations are valid, then something stronger than a *Franks*-type remedy is needed. The trouble with a *Franks*-type remedy, standing alone, is that it fails to cure the taint of the original constitutional violation, and the Government has not been punished for the original violation. As a result, the first phase of constitutional violation, i.e. the illegal warrantless intrusion, could be "painless" for the police if it merely results in redaction of the affidavit for purposes of review in a suppression hearing. *Leon* stated that "if exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, ... it must alter the behavior of individual law enforcement officers or the policies of their departments." 468 U.S., at 918. The evidentiary burden urged by the petitioner would fall initially on the Government prosecutor, but it would not take long for the point to get through to the police.

4. Avoidance of "Overcompensating"

A large part of the Fifth Circuit's rationale here was that the remedy should put the Government in no worse position than if the violation had not occurred. That reasoning also was prominent in *Herrold, supra* and *Gillenwaters, supra*. The rationale arose in the leading "inevitable discovery" case, *Nix v. Williams*, 467 U.S. 431 (1984), and was reiterated in *Murray, supra* at 537, concerning an aspect of "independent source" doctrine other

than "inevitable discovery" doctrine.[11] As stated in *Nix* and *Murray*:

> The interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not in a worse, position than they would have been in if no police error or misconduct had occurred. ...When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been absent any error or violation. 467 U.S., at 443.

Such reasoning is easy enough to apply in a case like *Nix*, where different government agents are pursuing different investigative approaches, and any constitutional violation by one agent might not even be known, let alone encouraged, by another agent. Fitting the reasoning to the facts is much harder here, where the agents worked together closely, and the warrant affiant, Special Agent John Wooley, was himself one of the officers who personally engaged in the unconstitutional initial intrusion at the Regency Square Court residence.

What is most important to remember is that there is no inherent conflict between the *Nix* rationale and the district court's interpretation of *Murray* here. The district court readily acknowledged the *Nix* reasoning in its original findings of fact. *Murray*, as construed by the district court,

---

11. *Murray, supra* at 539 explained at some length why "[t]he inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine ..."

actually adds to the vitality of *Nix*. At the risk of stating the obvious, the evidence found in the second search was obtained not merely because the agents wrote an affidavit, but because the magistrate issued a warrant. That process of issuing a warrant, the true "source" of the evidence, was "independent" only if the illegality did not affect the process. In a sense it would cheapen the rule of *Nix* to hold, as the Fifth Circuit effectively does, that a merely theoretical disregard of the tainted information by a reviewing court is just as much proof of an "independent" source as is sworn testimony about real-world hard work by the police, such as the search in *Nix* or the investigation in *Segura*.

The petitioner readily concedes that a requirement that the Government prove a lack of effect on the magistrate's decision could result in exclusion of evidence in some cases where the untainted information in an affidavit might have stood up by itself. The result in any given case would simply depend on the Government's ability to meet a burden of proof on a second factor under *Murray*. In other applications of "independent source" and "inevitable discovery" doctrine, the Government has a burden of proof. Why not here? This is no more harsh on the Government than the general rule on harmless error at trial, which postulates a finding of harm unless the Government shows that the error did not contribute to the factfinder's decision. *Chapman v. California, supra*.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant his petition for writ of certiorari, order full briefs and oral argument, then reverse the judgment of the Court of Appeals and direct the district

court to withdraw its supplemental findings and reinstate the original suppression ruling.

Respectfully submitted,

FOREMAN, DeGEURIN
& NUGENT

Mike DeGeurin, FBN 2558
909 Fannin, Suite 590
Houston, Texas 77010
(713) 655-9000

APPENDIX A
Opinion of the Court of Appeals

UNITED STATES of America,
Plaintiff-Appellant,

v.

Cesar Augusto RESTREPO and
Luis Pulido, Defendants-Appellees.

No. 91-6017.

United States Court of Appeals,
Fifth Circuit.

July 21, 1992.

Appeal from the United States District Court for the Southern District of Texas.

Before, JOHNSON, GARWOOD, and WIENER, Circuit Judges.

WEINER, Circuit Judge:

This suppression of evidence case, implicating the independent source doctrine, arises from the warrantless "security sweep" of the residence of Defendant-Appellee Luis Pulido and the subsequent search of that same residence pursuant to warrant. Plaintiff-Appellant United States appeals the district court's decision to exclude from Pulido's trial all evidence from the second search as tainted by the initial, illegal sweep. The government insists that the proper approach is to excise from the warrant affidavit those facts that were gleaned from the illegal search, and then to

consider whether the affidavit's remaining information is sufficient to constitute probable cause. Agreeing with the government that this is the correct methodology, we determine as a matter of law that the warrant affidavit, purged of information gained through the initial search, nevertheless contains sufficient remaining facts to constitute probable cause for the issuance of the search warrant. Additionally, however, we conclude that *Murray v. U.S.*,[1] requires the district court to determine--independent of our determination that the expurgated warrant affidavit provided probable cause for the issuance of the warrant by the magistrate judge--whether the illegal search *affected* or *motivated* the officers' decision to procure the search warrant. Because the district court did not undertake this required analysis, we remand to that court for the appropriate findings of fact and conclusions of law. Lastly, as to Defendant-Appellee Cesar Augusto Restrepo, we ask the district court to consider again its decision to exclude under Federal Rule of Evidence 403 evidence from the search of Pulido's residence.

I. FACTS AND PROCEEDINGS

A. SURVEILLANCE AND SECURITY SWEEP

On July 2, 1991, Customs Officer John Wooley received a confidential tip that narcotics trafficking was being conducted at a residence at 8996 Imogene, Houston, Texas (Imogene). Later that day, Wooley and other officers established surveillance on Imogene. A resident of the neighborhood, who somehow perceived that surveillance was being conducted, told one of the participating officers that many different cars arrived at Imogene, pulled into the garage, and then departed--a pattern, the government informs us, typical of drug trafficking.

---

[1] 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).

Wooley obtained information from Houston Light & Power (HL & P) that electric service had been established at Imogene on January 14, 1991, were listed to Luz Irene Pina (Pina), and named, Ally Flores (Flores) as a reference. Wooley discovered that Pina had also established electric service at a residence at 7254 Regency Square Court, Houston (Regency), on June 14, 1991. Flores was listed as a reference at Regency.

On the morning of July 3, 1991, officers established surveillance on Regency, and resumed it on Imogene. At about 10:20 a.m., officers watched as Restrepo arrived at Regency in a blue Toyota and picked up Pulido. Officers followed the blue Toyota to a strip mall where they observed Pulido making and receiving calls on a public telephone. Wooley believed that Pulido was making calls to digital pagers and receiving responding calls from the possessors of the pagers, also a pattern of drug trafficking, according to the government.

Restrepo left with Pulido after about eighteen minutes. The officers followed them to another strip mall, at which Pulido once again made and received calls at a public telephone. On this occasion, Pulido was observed with a large wallet and black ledger book in which he made notations. Restrepo and Pulido departed after about sixteen minutes.

Officers next followed the pair to a residence at 13901 Hollowgreen, Houston (Hollowgreen). After remaining inside Hollowgreen for a short time, Pulido and Restrepo departed at about 11:30 a.m., once again in the blue Toyota. Wooley reports that Restrepo drove the blue Toyota below the speed limit after leaving Hollowgreen, perhaps, speculates the government, in an attempt to expose

surveillance. At this time, officers observed Pulido using a cellular telephone while riding in the car with Restrepo.

Officers followed Restrepo and Pulido to a Home Depot store. At this location, Pulido was once again observed making calls at a pay telephone. Restrepo, in the meantime, drove away in the blue Toyota, apparently to rent video tapes. Shortly after 12:30 p.m., he returned to the Home Depot store and picked up Pulido. Officers then followed the blue Toyota back to Regency, where Pulido was dropped off. From there the officers followed Restrepo in the blue Toyota, terminating their surveillance on Regency.

Restrepo, shadowed by the surveillance team, went to a Dunkin' Donut shop. Two officers entered, informed Restrepo that they were conducting an investigation, and asked Restrepo if he would speak with them outside. Restrepo agreed. When officers asked where he lived, Restrepo responded that he lived in Queens, New York, but could not remember the exact address. Restrepo also stated that the blue Toyota had been loaned to him when he arrived in Houston, but when asked by whom, he could not recall.

Agent Wooley asked Restrepo about his connection with the man at Regency. Restrepo responded that he did not know him. When Restrepo was asked the name of the man at Regency, he responded "Enrique"; later, however, Restrepo stated that the man at Regency is named "Pedro." Restrepo told the officers that he and the man from Regency went to the Home Depot store and no other locations. When officers told Restrepo that he and the other man (who they later learned was Pulido) had been observed at Hollowgreen, Restrepo stated that he did, in fact, go to Hollowgreen.

Wooley then asked Restrepo for permission to search the blue Toyota. After some initial reluctance, Restrepo

consented. The officers' search produced the black ledger, previously seen with Pulido, and the wallet that contained $688.00 in small denominations. Entries in the ledger, Wooley reports, are consistent with narcotics transactions. A drug-sniffing dog "alerted" to the wallet, indicating, the government tells us, the odor of narcotics. Restrepo was arrested and taken to jail.

The officers thereupon returned to Regency "to interview Pulido." At that point, there had been a break of about fifteen minutes in the surveillance on Regency, the time it took the officers to follow, interrogate, and arrest Restrepo. A woman, later identified at Mayra Cata Garcia, answered the officers' knock. She was told by the officers that they had information that narcotics were being dealt from her residence. Garcia responded that she and her children were the only persons in the residence at that time. When asked, Garcia refused to permit the officers to search the residence, stating that she had arrived only six days earlier and was merely visiting.

Despite Garcia's unambiguous refusal to allow the search, the officers entered and searched, justifying their warrantless, consentless search as a "security sweep." Pulido was located upstairs, "hiding" in the bathroom of the master bedroom. According to the government, Pulido invited the officers to search the house at that time, but Agent Wooley declined. But according to Pulido, he did not consent to search. In any event, Pulido, Garcia, and the two children were detained in the living room for four hours while Wooley sought and obtained a search warrant. The officers did not consider that Pulido was under arrest during that period.

Immediately after leaving Regency, Wooley prepared an affidavit to support his application for warrants to search

Regency, Hollowgreen, and Imogene. Wooley's affidavit for the Regency warrant contained the following information: a description of his (Wooley's) experience with narcotics investigations; the confidential informant's tip about narcotics trafficking at Imogene; the neighbor's information about comings and goings at Imogene; the HL & P information linking Imogene (the suspected stash house) and Regency; the surveillance team's observations of Restrepo and Pulido; evidence seized from the blue Toyota; and information acquired as a result of the "security sweep" of Regency.

The portion of Wooley's affidavit containing information acquired as a result of the "security sweep" states:

> At 1:45 p.m., Agents went to 7254 Regency Square Court to talk with the occupants. At that address a Latin female answered the door. The Latin female identified herself as Mira [sic]. HPF Officer Garcia told Mira that he had developed information that narcotics trafficking was being conducted from the residence. Mira stated that she and her two children were the only persons at the residence. Officer Garcia asked Mira if she would consent to a search of the residence. Mira stated that she would not. Agents then conducted a security sweep of the residence to secure it until a search warrant could be obtained. In the upstairs master bedroom bath, Special Agent Wooley found Narvaez del Rio hiding.
>
> All occupants of the residence were moved to the living room area to ensure officer safety. Before leaving the residence to write the affidavit for the search warrant, Special Agent Wooley asked Narvaez

del Rio his name. He answered Luis Pulido.[2]

Restrepo and Pulido were indicted for conspiracy to distribute cocaine and for aiding and abetting one another in that conspiracy.

B. DISTRICT COURT'S RULING

The district court first found that the "security sweep" of Regency was unconstitutional; and the government does not contest that ruling before this court. Then, agreeing with Pulido, the district court ruled that all evidence seized from Regency pursuant to the search warrant must be suppressed because Wooley's search warrant affidavit contained information derived from the unconstitutional search. The district court based its decision on *Murray v. U.S.*, which held that a search pursuant to warrant is not an *independent source* of the evidence seized if the police officers' "decision to seek the warrant was prompted by what they had seen during the initial entry, *or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.*"[3] Because the government offered no evidence showing that the magistrate judge issuing the warrant in this case did not rely on "the entire affidavit in making the decision to sign the search warrant," the district court found that the search warrant could not constitute an independent source of the seized evidence.

The district court rejected the government's

---

[2] At the time Wooley prepared the affidavit, he believed that Pulido was actually Narvaez del Rio. Apparently the officers discovered a "cedula" from the Republic of Columbia for Raphael Antonio Narvaez del Rio in the large wallet found in the blue Toyota.

[3] 108 S.Ct. at 2535-36 (emphasis added; citations and footnote omitted).

contention that, using the methodology endorsed in *Franks v. Delaware*,[4] for excising false statements, the court should excise the tainted information from Wooley's affidavit and then consider whether the remaining untainted information furnished probable cause. The district court believed that it was bound by *Murray's* command that the illegally-acquired information not affect the magistrate judge's decision. The district court also relied on our post-*Murray* decision in *U.S. v. Register*[5] in declining the government's entreaty to apply the *Franks* procedure.

Finally, after determining that Restrepo lacked standing to challenge the search of Regency, the district court ruled that evidence from the Regency search was nevertheless inadmissible against Restrepo under Federal Rule of Evidence 403. The court gave no explanation of the factors involved in its balancing of unfair prejudice and probative value, merely stating that "the probative value of the evidence as to Restrepo is substantially outweighed by its prejudicial effect."

II. ANALYSIS

A. THE FRANKS METHODOLOGY

This case concerns the independent source exception to the exclusionary rule. The independent source doctrine is based "upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied" had

---

[4] 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

[5] 931 F.2d 308, 311 (5th Cir. 1991).

the misconduct not occurred.[6] Thus, even if police engage in unconstitutional activities--in this case, the initial entry and search of Regency in violation of the Fourth Amendment--evidence discovered during such illegal activities is nonetheless admissible if it is also discovered through an independent source.[7]

In *Murray*, a four-three decision, the Supreme Court ruled that bags of marijuana seen by police during an illegal warrantless search of a warehouse could still be seized pursuant to a later-acquired search warrant if independent information supported that warrant. The search warrant affidavit in *Murray* neither mentioned the warrantless entry nor contained information obtained from that entry so the illegal search clearly did not affect the magistrate judge's decision to issue the warrant.[8] Writing for the plurality, Justice Scalia explained the contours of the independent source doctrine in such circumstances:

> The ultimate question [] is whether the search pursuant to warrant was in fact a genuinely independent source of the information and

---

[6] *Murray*, 108 S.Ct. at 2535.

[7] *See Segura v. U.S.*, 468 U.S. 796, 814, 104 S.Ct. 3380, 3390, 82 L.Ed.2d 599 (1984) (evidence admissible when search warrant issued solely on basis of information known before previous illegal entry and items were not seen during illegal search). *See also, e.g., Hamilton v. Nix*, 809 F.2d 463, 467-68 (8th Cir. 1987) (testimonial evidence admissible when police lawfully learned of witness's involvement during an interrogation occurring before defendant's Fifth and Sixth Amendment rights were violated); *U.S. v. Cotton*, 770 F.2d 940, 947 (11th Cir. 1985) (evidence admissible despite illegal use of beeper because ground radar provided independent source of plane's location).

[8] 108 S.Ct. at 2536.

> tangible evidence at issue here. *This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant*.... The District Court found that the agents did not reveal their warrantless entry to the Magistrate, and that they did not include in their application for a warrant any recitation of their observations in the warehouse. It did not, however, explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse.[9]

The Court then ordered the case remanded to the district court for a determination whether the warrant-authorized search of the warehouse was *prompted* by the initial illegal search.

In the case now before us, the district court interpreted *Murray*'s phrase--"or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant"--as requiring the court to consider the *actual* effect of the illegally-acquired information in Officer Wooley's warrant affidavit on the decision of this *particular* magistrate judge to issue the warrant to search Regency. Although we acknowledge that the district court's interpretation is at least facially consistent with Justice Scalia's statement in *Murray*, we believe, for the reasons that follow, that the Supreme Court never intended this interpretation.

---

[9] *Id.* at 2535-36 (emphasis added; citations and footnote omitted).

Prior to *Murray*, this and other circuits had adopted variations on the rule that evidence obtained in an illegal search is first excised from the warrant affidavit, after which the expurgated version is evaluated for probable cause.[10] This approach was simply the logical extension of the rule in *Franks* that warrant affidavits containing *false statements* are to be afforded this treatment. In *Antone*,[11] for example, the defendant moved to suppress all evidence seized from his residence pursuant to a search warrant on the grounds that the warrant affidavit contained information gained through a prior illegal search. On review of the district court's denial of the defendant's motion, we found, as per *Franks*, that the district court acted correctly in excising the tainted information from the warrant affidavit and then considering whether the redacted warrant was nevertheless based on probable cause. We concluded, as had the district court, that because the tainted information constituted only a small part of the information presented to the magistrate judge in support of the search warrant, the warrant was based on probable cause.[12]

Nothing in *Murray*--other than perhaps the unfortunate sentence fragment in dispute here--indicates that the Supreme Court intended to reject the prevailing *Franks*-inspired rules.[13] The relevant phrase ("affected his decision to issue

---

[10] *See, e.g., U.S. v. Antone*, 753 F.2d 1301, 1307 (5th Cir. 1985); *U.S. v. Veillette*, 778 F.2d 899, 903-04 (1st Cir. 1985).

[11] 753 F.2d at 1307.

[12] *Id.*

[13] Of course, even had the plurality in *Murray* intended to question the established *Franks*-derived approach, its discussion of this point would constitute mere dictum given that tainted information was not even offered to the magistrate judge in that case.

the warrant"), almost certainly was simply a paraphrase--albeit a confusing one when considered noncontextually--of the approach long sanctioned in the circuits. The Third Circuit's recent decision in *U.S. v. Herrold*,[14] the only case we have found that even considers the interpretation of *Murray* espoused by Pulido, makes this point abundantly clear:

> [T]he Court's use of "affect" in *Murray* must be understood to signify affect in a substantive manner. Thus, the fact that an application for a warrant contains information obtained through an unlawful entry does not per force indicate that the improper information "affected" the justice's decision to issue the warrant and thereby vitiate the applicability of the independent source doctrine. Rather, if the application contains probable cause apart from the improper information, then the warrant is lawful and the independent source doctrine applies, providing that the officers were not prompted to obtain the warrant by what they observed during the initial entry.[15]

In addition, we find no other post-*Murray* circuit cases concerning the independent source doctrine that have interpreted *Murray* as refuting their pre-*Murray* holdings that inclusion of illegally-acquired information on a warrant affidavit does not invalidate the warrant if the affidavit's

---

[14] 962 F.2d 1131 (3rd Cir. 1992).

[15] *Id.* at 1141-1142.

other averments set forth probable cause.[16]

Finally, contrary to Pulido's assertion, our post-*Murray* decision in *Register* does not demand the suppression of evidence seized at Regency. *Register* did not hold that an affidavit containing tainted evidence *cannot* be an independent source; it held that the search warrant in that case was an independent source of evidence under *Murray* because the warrant affidavit contained *no* information gained in the illegal entry--as distinguished from affidavits containing false or (as here) tainted information.[17]

For the foregoing reasons, we find that the district court erred in concluding that *Murray* and *Register* require suppression of evidence seized at Regency in the absence of subjective proof by the government that the tainted information did not affect the decision of this particular magistrate judge to issue the warrant. Instead, in all such cases the district court should consider whether the warrant affidavit, once purged of tainted facts and conclusions, contains sufficient evidence to constitute probable cause for issuance of the warrant.

The government claims that Wooley's warrant affidavit, when expunged of tainted information, still contains sufficient evidence linking Regency with narcotics trafficking to support the search warrant. When, as here, the determinative facts are not in dispute, the question of

---

[16] *See, e.g., U.S. v. Gillenwaters*, 890 F.2d 679, 681-82 and n. 4 (4th Cir. 1989); *U.S. v. Johnston*, 876 F.2d 589, 592 (7th Cir. 1989). *Cf. U.S. v. Walker*, 931 F.2d 631, 633 (10th Cir. 1991) (evidence admissible because defendant failed to delineate what evidence in affidavit was obtained illegally).

[17] 931 F.2d at 311 (as affidavit contained no mention of information elicited by illegal search, warrant an independent source).

probable cause is one of law and may be resolved by this court.[18]

When we exclude from Wooley's warrant affidavit those facts and conclusions that would not have been available but for the illegal entry into Regency,[19] the affidavit still contains the following information: the confidential informant's tip about narcotics trafficking at Imogene; the neighbor's tip about comings and goings at Imogene; information from surveillance on the activities of Pulido and Restrepo; evidence suggestive of narcotics trafficking seized from the blue Toyota; Wooley's expert opinion that such conduct is typical of narcotics trafficking;

---

[18] Citing *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983), *U.S. v. Wake*, and *U.S. v. May*, 819 F.2d 531, 535 (5th Cir. 1987), Judge Johnson, in his concurring opinion, contends that we should remand this case to the district court for that court's determination of whether the expurgated warrant affidavit provided probable cause for the magistrate judge's issuance of the search warrant. We believe that remand is neither required by the authorities cited by the concurrence nor compelled by the particular facts in this case. The authorities cited by the concurrence stand for the proposition that the court (whether district court or appellate court) ruling on the suppression motion gives deference to the decision of the magistrate judge (or court) that issued the warrant. An appellate court need not give deference, however, to the district court's deferential review of the magistrate judge's decision. Moreover, we seriously doubt that it is appropriate to apply the deferential, substantial basis standard of review to the issuing magistrate judge's decision when the magistrate judge never considered the warrant affidavit purged of tainted information and the district court never reviewed such action of the magistrate judge.

[19] The district court found that, but for the illegal entry that confirmed that Pulido was in the house, Wooley would not have known that Garcia was lying when she said that she and her two children were the only persons home. Neither could Wooley have characterized Pulido as "hiding" or have connected (incorrectly) Pulido to the name Raphael Antonio Narvaez del Rio.

and the HL & P connection between Imogene (the suspected stash house) and Regency. After consideration of this independently-acquired, untainted information, we find as a matter of law that the expurgated warrant affidavit provided sufficient information linking Regency with suspected narcotics trafficking to constitute probable cause for issuance of a search warrant.

B. MOTIVATION: MURRAY'S NEW REQUIREMENT

Murray states that a search pursuant to warrant is not a genuinely independent source of evidence "if the agents' decision to seek the warrant was prompted by what they had seen during the initial [illegal] entry."[20] Thus, *Murray* instructs the trial court to determine--separate and apart from its determination of whether the expurgated warrant affidavit contains probable cause[21]--whether information gained through the illegal search influenced or motivated the officers' decision to procure a warrant.[22] In this case, therefore, this inquiry is answered in the negative

---

[20] 108 S.Ct. at 2535.

[21] "*Murray* is most significant precisely because the majority refused to follow the rather common position taken by the lower courts, namely, that the fruit-of-the-poisonous-tree issue presented by cases of this genre can be resolved by focusing *only* upon the question of whether facts obtained by the prior illegal action were critical to the probable cause finding supporting the warrant." Wayne R. LaFave, *Search and Seizure*, § 11.4(f), at 70 [1992 Supp.] (2d ed. 1987).

[22] *Accord U.S. v. Mithun*, 933 F.2d 631, 636 (8th Cir. 1991) (agent's decision to seek warrant not prompted by seeing flash suppressor); *U.S. v. Bosse*, 898 F.2d 113, 116 (9th Cir. 1990) (remanding to determine effect of illegal entry and search on the officers' decision to seek warrant); *U.S. v. Halliman*, 923 F.2d 873, 880 (D.C.Cir. 1991)(finding that prior entry did not influence decision to seek warrant not clearly erroneous).

if the district court finds that "the agents would have sought a warrant if they had not earlier entered" the Regency residence.[23] As LaFave explains, *Murray* is intended to deal with "the so-called 'confirmatory search,' conducted for the precise reason of making sure it is worth the effort to obtain a search warrant."[24]

Here, the district court did not consider whether the results of the illegal search of Regency prompted or motivated the officers' decision to seek the warrant. As motivation is a question of fact, we remand this issue to the district court. We nonetheless point out, by way of guidance only, that, unlike the objective test of whether the expurgated affidavit constitutes probable cause to issue the warrant, the core judicial inquiry before the district court on remand is a subjective one: whether information gained in the illegal search prompted the officers to seek a warrant to search Regency. In the best of all possible worlds, of course, there will be statements or other evidence directly probative of motivation or effect. But in the usual case, in which direct evidence of subjective intent is absent, a court must infer motivation from the totality of facts and circumstances.

Having determined that the question is for resolution by the district court in first instance, we have not scrutinized the record for this sort of information. We suggest, however, that the district court might wish to consider such items as the precise nature of the information acquired during the illegal search of Regency, the relative probative import of this information compared to all other information known to the officers, and the fact that Wooley obtained warrants for Imogene and Hollowgreen at the same time he obtained

---

[23] *Murray*, 108 S.Ct. at 2536.

[24] LaFave, *Search and Seizure*, § 11.4(f), at 70 [1992 Supp.].

one for Regency.

C. EXCLUSION UNDER RULE 403

The district court then ruled that evidence seized in the search of Regency was inadmissible against Restrepo under Rule 403, concluding (without explaining why) that "its probative value is substantially outweighed by the danger of unfair prejudice." The government contends that the district court failed to give sufficient weight to the evidence's probative value, and suggests that the court found the evidence unfairly prejudicial merely because it stems from an illegal search that Restrepo, an alleged co-conspirator, lacks standing to challenge.

As we must remand for findings of fact and conclusions of law on the question of whether the illegal "security sweep" of Regency prompted the officers to seek the search warrant in the first place, we ask that the district court reconsider its exclusion of this evidence as to Restrepo under Rule 403. It seems to us that this reconsideration should comprise, among other things, the nature of the charges in the indictment against Restrepo--that is, conspiracy to distribute cocaine and aiding and abetting in that conspiracy--and the identification of Pulido in the indictment as Restrepo's co-conspirator. Particularly when, as here, only two persons are charged in the indictment as co-conspirators, logic dictates that evidence of the participation of one of the alleged co-conspirators is relatively more probative as to the other alleged co-conspirators than the same evidence might be if the parties were simply charged, as co-defendants, with the direct commission of the predicate crimes. Nevertheless, if the district court should once again determine as to Restrepo that the unfair prejudice flowing from the Regency evidence substantially outweighs its probative value, it will be

incumbent upon that court to articulate fully the reasons for its ruling.

III. CONCLUSION

As a matter of law we hold that Wooley's warrant affidavit, when purged of information gained through the initial search, still contains facts sufficient to constitute probable cause for the issuance of the warrant to search Pulido's residence. Concluding, however, that *Murray*, requires the trier of fact to determine whether the illegal search motivated the officers to seek the search warrant, we remand that issue to the district court. Lastly, as to Restrepo, we ask the district court to reconsider its ruling under Rule 403 to exclude evidence obtained in the search of Pulido's residence.

REVERSED in part and REMANDED in part.

JOHNSON, Circuit Judge, concurring:

While I agree that the majority has formulated the correct methodology for analyzing a warrant affidavit tainted by an illegal search, I am concerned with its conclusion that the warrant affidavit contains sufficient facts to constitute probable cause. It seems to me that it is at least a close question in this case whether the warrant affidavit, purged of the information gleaned from the illegal search, contains sufficient facts to support a finding of probable cause. Because the district court is in a better position to review the warrant affidavit, I would remand this case to the district court for its own probable cause analysis. *See Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983); *United States v. Wake*, 948 F.2d 1422,

1428 (5th Cir. 1991); *United States v. May*, 819 F.2d 531, 535 (5th Cir. 1987).[1]

In all other respects, I concur in the majority opinion.

---

[1] The majority in this case conducts a de novo review of the sufficiency of the warrant affidavit. I cannot join in this result. The Supreme Court in *Illinois v. Gates* has *expressly* forbidden de novo review of the sufficiency of a warrant affidavit. 462 U.S. at 236, 103 S.Ct. at 2331 ("we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review."). The reason for this rule is simple: the courts of appeals are ill equipped to undertake an extensive after-the-fact review of the sufficiency of a warrant affidavit.

Nonetheless, from the remote position of an appellate court, the majority would offend this rule and attempt to reevaluate the sufficiency of a warrant affidavit. The majority distinguishes *Gates* on the basis that *Gates* involves the review of a magistrate, not the district court. The majority concludes that "[a]n appellate court need not give deference ... to the district court's deferential review of the magistrate judge's decision." Majority Opinion, at 971 n. 18. Significantly, however, the majority cites *no* authority for this distinction. *Nor* does it attempt to justify the distinction. I must conclude that the language in *Gates* requires that we remand. This Court is an inappropriate forum for the type of extensive review that the majority conducts in this case.

APPENDIX B
District Court's Original Findings
of Fact and Conclusions of Law

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
9-23-91
JESSE E. CLARK, CLERK
/s/

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
v.	§	CRIMINAL NO. H-91-124
	§	
CESAR AUGUSTO RESTREPO	§	
	§	
LUIS PULIDO	§	

O R D E R

Pending before this Court are the motion to suppress evidence (Document #19) filed by defendant Cesar Augusto Restrepo ("Restrepo") and the motion to suppress (Document #20) filed by the defendant Luis Pulido ("Pulido").

After having considered the evidence presented at a hearing beginning September 17, 1991 and concluding September 20, 1991, the Court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Agents established surveillance at a residence at 7254 Regency Square Court (hereinafter "Regency address") at 9:00 a.m. on July 3, 1991. Agents observed a latin male in a blue Toyota (later determined to be Restrepo) arrive at the Regency address at approximately 10:20 a.m. and pick up another latin male (later determined to be Pulido).

2. At 10:30 a.m., surveillance followed the blue Toyota to a strip center where Pulido was observed making and receiving calls at a pay telephone. Pulido spent approximately 18 minutes on the telephone. Restrepo remained in the vehicle.

3. Surveillance followed the blue Toyota to another strip center where Pulido was again observed making and receiving calls at a pay telephone. Pulido was also observed holding a large ledger book and a large wallet. Pulido was further observed writing in the black ledger book during his conversations at the pay telephone.

4. It is Special Agent John Wooley's ("Wooley") experience that the use of pay telephones is consistent with drug trafficking.

5. Surveillance then followed the blue Toyota to a residence at 13901 Hollowgreen, Houston, Texas (hereinafter "Hollowgreen address"). Restrepo and Pulido were observed exiting the blue Toyota and looking around. Wooley established surveillance at the Hollowgreen address outside of his vehicle. He observed Restrepo and Pulido return to the blue Toyota.

6. Subsequent surveillance followed the blue Toyota as it departed the Hollowgreen address at approximately 11:30

a.m. At this time, the driving pattern of the blue Toyota was different than surveillance earlier in the day. The blue Toyota reduced its speed below the speed limit. Additionally, Pulido was observed using what appeared to be a cellular telephone in the vehicle.

7. It is Wooley's experience that driving below the speed limit is a device used by drug traffickers to expose surveillance.

8. Based upon all of the foregoing facts, Wooley determined at that time that surveillance might have been spotted by Restrepo and Pulido.

9. Surveillance followed the blue Toyota to a Home Depot store. At the Home Depot store, agents observed Pulido exit the vehicle and go to an adjacent pay telephone. Pulido was then observed to make phone calls and wait near the telephone. Pulido then entered the Home Depot store, made a small purchase, and left the store.

10. Simultaneously, other agents maintained surveillance on the blue Toyota which went to a video rental store. Restrepo exited the vehicle, returned videos, and rented other videos. At approximately 12:30 p.m., Restrepo then returned to the blue Toyota and drove back to the Home Depot store where he picked up Pulido.

11. Surveillance followed the blue Toyota to the Regency address. Pulido was observed exiting the vehicle and entering the residence at the Regency address.

12. Surveillance followed the blue Toyota from the Regency address to a Dunkin Donut shop. Restrepo was observed exiting the vehicle and entering the donut shop.

13. At approximately 12:45 p.m., two agents dressed in civilian clothes entered the donut shop, approached Restrepo, advised him that they were agents conducting an investigation, and asked him to step outside with them. Restrepo agreed. Outside, the two agents and Restrepo were joined by other agents.

14. The agents interviewed Restrepo. Restrepo told agents that he was a Columbian national, he had borrowed the car from Raphael, and that he lived in New York. Wooley noticed a bulge in Restrepo's pocket which Wooley, believing the bulge might be a weapon, patted. Wooley ascertained that the bulge was a digital pager. Wooley asked to see the pager and asked Restrepo not to turn the pager off. When Restrepo pulled the pager from his pocket it was turned off.

15. Agents continued the interview of Restrepo. Restrepo stated that he and Pulido went to the Home Depot store and no other locations. Based upon surveillance, agents knew this information was inaccurate. The agents informed Restrepo that he and Pulido had been followed. Restrepo became nervous and changed his story about the locations to which he had traveled.

16. The agents presented Restrepo with a Consent to Search form. Restrepo read the form and declined to sign it. Restrepo indicated that he could not consent to a search of the vehicle because he did not own the vehicle. Wooley explained to Restrepo that, as the vehicle was under Restrepo's control, he could consent to the search. Wooley testified that Restrepo said that he did not know what was in the vehicle and did not care if the officers searched it.

17. The agents' search of the vehicle resulted in the discovery of the black ledger previously carried by Pulido.

It is Wooley's experience that the entries in the ledger are consistent with records of narcotics transactions.

18. The search of the vehicle further resulted in the discovery of the wallet previously carried by Pulido. The wallet contained $688.00 in currency. A drug sniffing dog alerted to the wallet. It is Wooley's experience that when a drug sniffing dog alerts to something, it indicates the presence of narcotic odor.

19. The search of the vehicle further revealed a cellular telephone.

20. Agents then placed Restrepo under arrest at approximately 1:30 p.m.

21. During the foregoing period of time, surveillance at the Regency address had lapsed for approximately 15 minutes.

22. At approximately 1:45 p.m., the agents went to the Regency address to interview Pulido. Wooley testified he did not know why he and the other agents did not obtain a search warrant prior to going to the Regency address. Wooley believed that he had sufficient information at that time to obtain an arrest warrant for Pulido but he did not do so.

23. When agents knocked at the door at the Regency address, Mayra Cata Garcia ("Garcia") answered. Agents informed her that they were conducting a narcotics investigation. Garcia said that she and her children were alone in the residence. Agents believed Garcia was lying as they had previously observed Pulido enter the residence. Agents then requested consent from Garcia to search the residence. She refused.

24. Notwithstanding Garcia's refusal, the agents entered the residence and conducted a security sweep of the entire residence. During the sweep, agents discovered Pulido in an upstairs bathroom.

25. Wooley testified that he did not inform Pulido at that time that he was under arrest. Instead he asked all of the occupants of the house to move into the living room area. Agent Wooley then departed to obtain a search warrant.

26. Agent Wooley obtained a search warrant upon his own affidavit at approximately 6:30 p.m., more than four hours after initially entering the residence without a warrant.

27. In addition to the surveillance facts as recited above, Wooley's affidavit in support of the search warrant included the statement that "In the up stairs master bedroom bath Special Agent Wooley found Narvaez del Rio hiding." It continued "[b]efore leaving the residence to write the affidavit for the search warrant, Special Agent Wooley asked Narvaez del Rio his name. He answered, Luis Pulido." Upon the supporting affidavit, United States Magistrate Judge Frances Stacy signed a search warrant for the residence at the Regency address.

28. Agents searched the Regency address and discovered a briefcase, a two-day planner, a black notebook, an Avianca airline ticket, $15,000 in U.S. currency, and a large bag of rubber bands. A further search of a trash can inside the residence revealed torn ledgers.

29. After the search of the Regency address, agents placed Pulido under arrest. Wooley testified that he did not consider Pulido to be in custody prior to his arrest.

30. Any conclusion of law that should be construed as a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated." Rakas v. Illinois, 439 U.S. 128, 130-31 n.1 (1978). An individual with a legitimate, reasonable expectation of privacy in the space may claim the protection of the Fourth Amendment. Id. at 143-44. Restrepo had a legitimate, reasonable expectation of privacy in the automobile as the automobile was within Restrepo's control. Pulido had a legitimate, reasonable expectation of privacy in the Regency house as he was a resident of the house.

2. An investigatory stop of a vehicle must be justified by reasonable suspicion that the person stopped is, or is about to be, engaged in some type of criminal activity. United States v. Hensley, 469 U.S. 221, 226 (1985). "Reasonable suspicion" is the accumulation of "those articulable, objective facts and circumstances observed by the officer, coupled with the rational inferences which can be drawn from those facts and circumstances." Terry v. Ohio, 392 U.S. 1, 30 (1968). "Reasonable suspicion" contemplates the "totality of the circumstances, including the 'collective knowledge' of all [the] officers in assessing the facts." United States v. Shaw, 701 F.2d 367, 377 n. 4 (5th Cir. 1983) (quoting United States v. Cimino, 631 F.2d 57, 59 (5th Cir. 1980). Based upon the agents' experience and conduct observed during surveillance of the blue Toyota, agents had reasonable suspicion that Restrepo was engaged in or about to be engaged in criminal activity.

3. The Government bears the burden of proving the voluntariness of a consent to a warrantless search by a

prèponderance of the evidence. United States v. Hurtado, 905 F.2d 74, 76 (5th Cir. 1990). This Court finds that the preponderance of the evidence supports a conclusion that Restrepo voluntarily consented to a search of the blue Toyota.

4. No arrest warrant is necessary if an officer has probable cause to arrest and the arrestee is in a public place. United States v. Wilson, 423 U.S. 411, 418-21 (1976). Information gained as a result of an investigatory stop can, when accompanied with reasonable suspicion, become probable cause. See United States v. Sokolow, 490 U.S. 1 (1989). Probable cause exists when the facts and circumstances within the knowledge of officers are sufficient to warn a man of reasonable caution that an offense has been or is being committed by the person arrested. United States v. Simmons, 918 F.2d 476, 479 (5th Cir. 1990). Agents had probable cause to believe that Restrepo had been or was committing an offense based upon the agents' experience, conduct observed during surveillance, the ledger containing entries consistent with narcotics trafficking, and the wallet which had the aroma of narcotics. Therefore, no arrest warrant was necessary to arrest Restrepo.

5. "A warrantless search is per se unreasonable unless the government can demonstrate that it falls within one of a carefully defined set of exceptions to the fourth amendment's warrant requirement." United States v. Munoz-Guerra, 788 F.2d 295 (5th Cir. 1986); See Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1971).

6. Exigent circumstances will overcome the presumption of unreasonableness that attaches to a warrantless home entry as long as the exigent circumstances are not of the government's making. United States v. Thompson, 700 F.2d 944, 950 (5th Cir. 1983). Exigent circumstances did not

exist under the instant facts as an urgency which may have existed at the time the agents suspected that surveillance was spotted is belied by their own actions. The agents believed at 11:30 a.m. that their surveillance had been spotted and yet they did not detain Restrepo and Pulido at that time. The agents waited until after Restrepo had left Pulido at the Regency address and traveled to a donut shop to approach him. If the agents feared that Restrepo and/or Pulido would destroy evidence upon spotting surveillance, the urgency existed at that time. No such urgency justifying a warrantless entry into the Regency address existed at 1:45 p.m.

7. A protective sweep of a residence is an appropriate "adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime." Maryland v. Buie, 110 S.Ct. 1093, 1099-1100 (1990). Agents improperly conducted a protective sweep of the residence at the Regency address because, in accordance with Wooley's own testimony, it was not conducted as an adjunct to taking Pulido into custody. (See Finding of Fact #29).

8. The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search. Weeks v. United States, 232 U.S. 383 (1914). When the challenged evidence has an independent source, however, exclusion of such evidence would put the police in a worse position than they would have been in absent any constitutional error, and therefore, would not serve the interests of society intended by the Fourth Amendment. See Nix v. Williams, 467 U.S. 431, 443 (1984).

9. The question presented to this Court is identical to that presented to the United States Supreme Court in 1988: Whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible

evidence at issue. See Murray v. United States, 108 S.Ct. 2529, 2535 (1988). This will not be the case if "the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." Id. at 2535-36 (emphasis added).

10. When a warrant is issued upon probable cause after agents conduct a security sweep of the premises for which the warrant is sought, evidence seized pursuant to the warrant should not be suppressed if the affidavit in support of the search warrant reveals no mention of information elicited by the security sweep other than the general statement that the premises has been secured. United States v. Register, 931 F.2d 308, 311 (5th Cir. 1991). The affidavit in support of the search warrant to search the Regency address reveals information elicited by the security sweep, to wit, that Pulido was located inside the residence; because there has been a suspension of the surveillance of the Regency address, agents could not have known that Pulido was inside the residence before they entered. Thus, the affidavit in support of the search warrant was based upon information obtained through an unlawful entry. It cannot, therefore, be admitted in accordance with the independent source doctrine.

11. The Government suggests that Wooley's affidavit demonstrates probable cause to search the Regency address even without the information derived from the protective sweep of the residence. While this Court might not disagree with this basic assertion, this Court finds no support in law for the Government's suggestion that harmless error can be applied to the independent source doctrine. Moreover, in the absence of any evidence to the contrary, this Court must assume that Judge Stacy relied upon the entire affidavit in

making the decision to sign the search warrant. As such, Murray commands that the independent source doctrine does not apply. Additionally, if the agents had sufficient facts to support the issuance of a search warrant prior to entering the Regency address, this Court is unsatisfied with the absence of an answer to the question why they failed to obtain such warrant before entering the residence.

12. Any finding of fact that should be construed as a conclusion of law is hereby adopted as such.

Based on the foregoing, the Court ORDERS that:

(1) Restrepo's motion to suppress evidence (Document #19) is DENIED;

(2) Pulido's motion to suppress (Document #20) is GRANTED. It is further ORDERED that all evidence obtained from the warrantless entry and subsequent search of the Regency address, and all fruits thereof, are hereby SUPPRESSED as evidence at trial.

SIGNED at Houston, Texas, on this the 23rd day of September, 1991.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX C
District Court's Findings of Fact
and Conclusions of Law on Remand

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
SEP 17 1992
Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
SEP 21 1992
Michael N. Milby, Clerk
By Deputy:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	CRIMINAL NO. H-91-124
	§	
CESAR AUGUSTO RESTREPO	§	
LUIS PULIDO	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 21, 1992, the Fifth Circuit Court of Appeals reversed this Court's order excluding all of the evidence seized from 7254 Regency Square Court pursuant to a search warrant and remanded the case for a determination of whether information gained in the illegal search prompted the

officers to seek the warrant to search 7254 Regency Square Court. United States v. Restrepo, 966 F.2d 964, 972 (5th Cir. 1992). The Court of Appeals further instructed this Court to reconsider its order granting Cesar Augusto Restrepo's (Restrepo) oral motion in limine which effectively excluded the evidence seized at 7254 Regency Square Court against Restrepo under Fed.R.Evid. 403. To that end, the Court enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Prior to entering 7254 Regency Square Court, United States Customs Agent John Wooley encountered Myra Garcia (Suppression Hearing, I-46).

2. One of the surveillance officers showed Ms. Garcia a consent to search form and asked if she would consent to a search of the premises; she refused (Suppression Hearing I-46-47).

3. Ms. Garcia explained that she was not the owner of the property and did not feel that she had the power to consent.

4. At this point Agent Wooley, cognizant of the fact that Pulido had last been observed entering the residence, determined that the premises had to be secured in order to insure the safety of the officers pending acquisition of a search warrant (Suppression Hearing I-47-48).

5. Agent Wooley and his surveillance team executed what they deemed a "protective sweep" of the residence located at 7254 Regency Square Court.

6. Agent Wooley testified that one function of the "protective sweep" was to insure that no one destroyed evidence (Suppression Hearing I-110).

7. During the course of the protective sweep, the investigating officers did not seize any tangible objects (Suppression Hearing I-49).

8. As he swept through the house, Agent Wooley encountered Luis Pulido upstairs as Pulido emerged from the master bathroom.

9. The investigating officers executed a perfunctory "pat down" search, and escorted Pulido to the living room (Suppression Hearing I-49).

10. During this encounter, the defendant identified himself as Luis Pulido (Suppression Hearing I-54).

11. Pulido voluntarily consented to a search of the premises, but Agent Wooley refused (Suppression Hearing I-54).

12. In response to a query posed by Pulido's counsel, Agent Wooley related that agents walked through the premises looking for the presence of "dangerous people" (Suppression Hearing I-73).

13. After the protective sweep, Pulido, Ms. Garcia, and two children were kept in the living room (Suppression Hearing I-50).

14. After everyone had been secured in the living room, Agent Wooley and Special Agent Muehlenweig left the premises and returned to their office where they

prepared the affidavits for the search warrant (Suppression Hearing I-50).

15. The special agents prepared three applications for search warrants (Suppression Hearing I-50).

16. Agent Wooley believed that he and his agents possessed sufficient data to support a finding of probable cause before they entered 7254 Regency Square Court (Suppression Hearing I-84, 108).

17. All of the evidence seized at 7254 Regency Square Court was seized and secured under the authority of the search warrant (Suppression Hearing I-52).

18. The warrants authorizing the searches of the premises located at 8996 Imogene and 13901 Hollowgreen were issued at the same time as the warrant for 7254 Regency Square Court.

19. The affidavits supporting the applications for search warrants for all three residences contain the same data save for the location to be searched.

20. On the day the evidence was seized, Cesar Augusto Restrepo (Restrepo) drove the vehicle in which Pulido was a passenger.

21. Restrepo entered 7254 Regency Square Court on the morning of July 3, 1991, and exited in Pulido's company.

22. While in Pulido's company, Restrepo drove to two strip centers where Pulido was observed to make and receive telephone calls on public pay telephones (Suppression Hearing I-25-26).

23. Restrepo and Pulido were next observed at a residence located at 13901 Hallowgreen, Houston, Texas, where S/A Wooley believed he had been seen by both men as they exited the residence (Suppression Hearing I-27).

24. Restrepo then drove the vehicle in a manner calculated to detect surveillance, and Pulido was observed to use a cellular telephone while in the car (Suppression Hearing I-28-31).

25. Restrepo returned Pulido to 7254 Regency Square Court.

26. Any conclusion of law that should be construed as a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. In its opinion, the Fifth Circuit observes that Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529 (1988), instructs the trial court to determine - separate and apart from its determination of whether the expurgated warrant affidavit contains probable cause - whether information gained through the illegal search influenced the officer's decision to procure a warrant. United States v. Restrepo, 966 F.2d at 971. "In this case, therefore, this inquiry is answered in the negative if the district court finds that the agents would have sought a warrant if they had not earlier entered the Regency residence." Id. at 971.

2. This court's inquiry is subjective: whether information gained in the illegal search prompted the officers to seek a warrant to search 7254 Regency Square Court. Ibid, 966 F.2d at 972. This court

may determine motivation from direct evidence of subjective intent and may infer motivation from the totality of the circumstances.

3. Special Agent Wooley and his fellow officers had conducted an extensive surveillance of Pulido and Restrepo on the day the warrant was executed. During this surveillance, the agents had observed Pulido engage in conduct consistent with narcotics trafficking. Pulido and Restrepo drove about the city of Houston making frequent stops at public telephones where they would place and receive several calls before moving on to another telephone. Pulido's associate, Restrepo, was arrested subsequent to a valid consent search of the automobile that he and Pulido had used throughout the day. At the time of Restrepo's arrest, the agents seized a pad containing notations reportedly reflecting narcotics trafficking and a canine, trained in detecting evidence of narcotics, had alerted on the wallet and the cash found in the vehicle. Members of the surveillance team observed these items in Pulido's possession. From these observations and the evidence gleaned during the surveillance of 8996 Imogene, Special Agent Wooley could reasonably believe that Restrepo and Pulido had engaged in narcotics trafficking. During the course of that activity, Pulido and Restrepo twice stopped at Regency Square Court. The first when Restrepo picked Pulido up and the second when Restrepo dropped him off. Since Pulido remained at 7254 Regency Square Court, the officers reasonably viewed these premises as a location where they were likely to find evidence of narcotics trafficking. Agent Wooley testified that this data brought him to 7254 Regency Square Court to attempt to secure the owner's consent to search the

premises.

4. The record of the suppression hearing reflects that the only things the agents learned as a consequence of the protective sweep is the fact that Pulido was in the house and that his name was "Pulido". Agent Wooley testified, and this Court finds, that this knowledge did not prompt him to acquire a search warrant. The decision to acquire the warrants is based upon the cumulative information the agents obtained during the surveillance of Pulido and Restrepo following the tip regarding the activities around 8996 Imogene. United States v. Mithun, 933 F.2d 631, 636 (8th Cir. 1991).

5. Special Agent Wooley acquired warrants authorizing the search of 8996 Imogene and the search of 13901 Hollowgreen at the same time he secured a warrant to search 7254 Regency Square Court. Nothing the special agent would have observed in 7254 Regency Square Court would have justified the search of the other residences. The facts of this case are not unlike those of United States v. Halliman, 923 F.2d 873, 881 (D.C. Cir. 1991). In Halliman, the District of Columbia Court of Appeals (Thomas, J.) upheld the district court's finding that investigating officers did not decide to obtain an emergency warrant based on what they had seen during their entry into a hotel room they had not been authorized to search under the warrants in their possession prior to their entry into that room. The Halliman Court observed that the district court had reviewed copies of the affidavits and the warrants authorizing the searches of other hotel rooms for which warrants had been issued and found that the information supporting the issuance of those warrants also supported issuing the emergency

warrant in controversy. United States v. Halliman, at 881. In the case at bar. the fact that Pulido was discovered in the bathroom at Regency Square Court would not have prompted Special Agent Wooley to apply for warrants to search the Imogene premises and the Hollowgreen premises. Further, the fact that all three warrants were sought based on other information available to the officers is compelling evidence that the fruits of the illegal search did not affect the officers' decision to obtain a warrant.

6. From the totality of the circumstances and from Special Agent Wooley's testimony that he believed he had probable cause justifying the search of 7254 Regency Square Court, the Court concludes that the agents were not prompted to acquire the search warrants by anything they observed during their illegal entry into 7254 Regency Square Court.

7. Under Rule 403 of the Federal Rules of Evidence, "unfair prejudice" means "an undue tendency to suggest decision on an improper basis. . ." Fed.R.Evid. 403, Notes of Advisory Committee.

8. In its opinion the Court of Appeals observed when "only two persons are charged in the indictment as co-conspirators, logic dictates that evidence of participation of one of the alleged co-conspirators is relatively more probative as to the other alleged co-conspirators than the same evidence might be if the parties were simply charged, as co-defendants, with the direct commission oft he predicate crimes. United States v. Restrepo, 966 F.2d at 972. "Once a defendant has been connected with the conspiracy through his own conduct, all acts and statements of his co-conspirators during the pendency and in

furtherance of the conspiracy are admissible against him." United States v. Silva, 748 F.2d 262, 264 (5th Cir. 1984). "Acts by others . . . before or after the conspiracy may be relevant in suggesting the existence . . . of the conspiracy." United States v. Villareal, 764 F.2d 1048, 1053 (5th Cir.), cert. denied 475 U.S. 1089 (1986).

9. In the case before the Court, Pulido's and Restrepo's conduct suggest a concert of action indicative of involvement in an agreement to engage in narcotics trafficking. Since Restrepo's known involvement in the alleged offense began at 7254 Regency Square Court, the evidence that had been seized there supports an inference of the existence of a conspiracy. Restrepo has failed to identify any unfair prejudice that would result from the admission of the evidence against him. The probative value of this evidence is not substantially outweighed by any prejudicial effect flowing from it. Accordingly, this Court's order granting Restrepo's oral motion in limine is withdrawn.

Based on the foregoing, the Court

ORDERS that:

(1) Pulido's motion to suppress is DENIED;

(2) Restrepo's motion in limine is DENIED.

SIGNED this 17 day of Sept 1992, at Houston, Texas.

/S/ David Hittner
UNITED STATES DISTRICT JUDGE

(2)

No. 92-646

Supreme Court, U.S.
FILED
DEC 11 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

LUIS PULIDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SIDNEY M. GLAZER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a warrant that contains information derived from an unlawful search is valid under *Murray* v. *United States*, 487 U.S. 533 (1988), if the government's decision to seek the warrant was not affected by the unlawful search and if the warrant would have established probable cause even without the information derived from the unlawful search.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Franks v. *Delaware*, 438 U.S. 154 (1978)	5
Murray v. *United States*, 487 U.S. 533 (1988)	6, 7, 8
United States v. *Gillenwaters*, 890 F.2d 679 (4th Cir. 1989)	6
United States v. *Herrold*, 962 F.2d 1131 (3d Cir.), cert. denied, 113 S. Ct. 421 (1992)	6
United States v. *Karo*, 468 U.S. 705 (1984)	7
United States v. *Salas*, 879 F.2d 530 (9th Cir.), cert. denied, 493 U.S. 979 (1989)	6

Statutes:

18 U.S.C. 1956(a)(1)(B)(i)	6
21 U.S.C. 841 (1988 & Supp. III 1991)	2
21 U.S.C. 846	2

Miscellaneous:

Robert Stern et al., *Supreme Court Practice* (6th ed. 1986)	7

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-646

LUIS PULIDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 966 F.2d 964. The opinion of the district court (Pet. App. 20a-30a) and a related order of the district court on remand from the decision under review (Pet. App. 31a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1992. The petition for a writ of certiorari was filed on October 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was charged by an indictment in the United States District Court for the Southern District of Texas with conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and distribution of cocaine, in violation of 21 U.S.C. 841 (1988 & Supp. III 1991). The district court granted petitioner's motion to suppress certain evidence seized pursuant to a search warrant, but the court of appeals reversed and remanded to the district court for further consideration of the suppression issue. Pet. App. 1a-19a.

1. On July 2, 1991, a Customs Service agent received information that drug trafficking was being conducted at a residence at 8996 Imogene Street, in Houston, Texas. After police officers established surveillance of the residence, a neighbor reported that many different cars arrived and departed at the residence in a pattern the officers believed to be typical of drug trafficking. The agent next learned from the electric company that the person listed for electric service at the Imogene Street residence also had established service at 7254 Regency Square Court in Houston. Officers then established surveillance of the Regency Square Court residence as well. Pet. App. 2a-3a.

At about 10:30 a.m. on July 3, 1991, Cesar Augusto Restrepo picked up petitioner at the Regency Square Court address in a blue Toyota. Under the observation of officers, the pair went to two shopping centers where petitioner made and received telephone calls on public telephones. Petitioner had a large wallet and a black ledger book in which he made notations. The two then drove to a residence at 13901 Hollowgreen

Street; petitioner made telephone calls on a cellular telephone during the drive. The two left the Hollowgreen residence after a short stay and drove to another store, where petitioner made further calls from another pay telephone. Restrepo subsequently picked petitioner up in the blue Toyota and dropped him off at the Regency Square Court address. Pet. App. 3a-4a.

After petitioner and Restrepo separated, the officers approached and questioned Restrepo briefly. Restrepo told the officers that he lived in New York but could not remember his address; he stated that he did not own the blue Toyota and did not know who did; and he stated that he did not know petitioner. With Restrepo's consent, the officers searched the Toyota. In the course of the search they found the black ledger and the wallet petitioner had been seen using. Shortly thereafter, a drug-sniffing dog alerted to the wallet—indicating the odor of narcotics—and Restrepo was arrested. Pet. App. 4a-5a.

The officers promptly returned to the Regency Square Court residence to interview petitioner, arriving about 15 minutes after they had left to follow Restrepo. They told the woman who answered their knock that they had information that narcotics were being distributed from the residence. The woman responded that she and her children were the only persons in the residence at the time, and she refused to allow the officers to search the residence. Nevertheless, justifying their action as a security sweep, the officers entered and found petitioner in the bathroom of the master bedroom. Pet. App. 5a.

An officer then departed to apply for a warrant to search the Regency Square Court, Imogene, and Hollowgreen residences, using the same supporting affidavit for each warrant. The affidavit recited the agent's experience with narcotics investigations, the facts set forth above, and that the officers "conducted a security sweep of the [Regency Square Court] residence to secure it until a search warrant could be obtained." Pet. App. 5a-6a. The affidavit also stated that, even though they were told that a woman and her children were the only persons in the residence, they found petitioner hiding in a bathroom, and that his name was different from the name in the wallet found in the Toyota. *Id.* at 6a-7a & n.2. After a warrant was issued, officers searched the Regency Square Court residence and discovered $15,000 in cash as well as drug and money ledgers. The officers then arrested petitioner. *Id.* at 25a; Gov't C.A. Br. 12. A search of the Imogene residence revealed 136 kilograms of cocaine, drug-related paraphernalia, a drug ledger, and $63,000 in cash. Gov't C.A. Br. 13.

2. The district court suppressed the evidence seized under the search warrant. Pet. App. 20a-30a. The court first concluded that the security sweep of the Regency Square Court residence was unlawful because it was not conducted in connection with petitioner's arrest. *Id.* at 28a. The court then ruled that the search warrant did not constitute an independent source for the evidence obtained during the searches, because the supporting affidavit contained information derived from the unlawful search. *Id.* at 29a-30a. The court rejected the government's argument that the warrant demonstrated probable cause

without the information derived from the protective sweep of the residence. The court concluded that it must assume, in the absence of contrary evidence, that the magistrate "relied upon the entire affidavit in making the decision to sign the search warrant. As such, *Murray* [v. *United States*, 487 U.S. 533 (1988),] commands that the independent source doctrine does not apply." Pet. App. 29a-30a.

3. The court of appeals reversed. Pet. App. 1a-19a. The court first rejected the district court's view that the warrant was automatically invalid because it included evidence derived from the illegal search. *Id.* at 8a-13a. Instead, adopting the methodology applied by this Court in *Franks* v. *Delaware*, 438 U.S. 154 (1978), the court concluded that the question is "whether the warrant affidavit, once purged of tainted facts and conclusions, contains sufficient evidence to constitute probable cause for issuance of the warrant." Pet. App. 13a. Applying that test, the court concluded that the warrant was valid. *Id.* at 13a-15a.[1] Finally, the court noted that the district court had not determined whether the officers' decision to seek the warrant was prompted by the illegal entry. The court therefore remanded the case to the district court with instructions to consider that question. *Id.* at 15a-17a.[2]

---

[1] Judge Johnson concurred on this point, arguing that the majority should have remanded the case to the district court to allow the district court to make the initial determination regarding the adequacy of the warrant. Pet. App. 18a-19a.

[2] After the case was remanded, the district court denied the motion to suppress. Pet. App. 31a-40a. The court noted that the suppression hearing reflected that the only thing the

ARGUMENT

Petitioner contends (Pet. 5-21) that the court of appeals erred in determining that it is proper to uphold a warrant containing information derived from an unlawful search if the warrant contained sufficient information to establish probable cause even without the improperly obtained information. Petitioner does not suggest that any of the courts of appeals have adopted a different approach. In fact, the ruling of the court of appeals is consistent with the decisions of the other courts of appeals to consider the question after *Murray* v. *United States*, 487 U.S. 533 (1988). See, *e.g.*, *United States* v. *Herrold*, 962 F.2d 1131, 1137-1138 (3d Cir.), cert. denied, 113 S. Ct. 421 (1992); *United States* v. *Gillenwaters*, 890 F.2d 679, 681-682 (4th Cir. 1989); *United States* v. *Salas*, 879 F.2d 530, 537-539 (9th Cir.), cert. denied, 493 U.S. 979 (1989). Moreover,

---

agents learned as a result of the protective sweep was that petitioner was in the house and that his name was Pulido. *Id.* at 37a. The district court concluded that this knowledge did not prompt the officers to seek the search warrant for the Imogene and Hollowgreen premises. *Ibid.*

On October 22, 1992, after the certiorari petition was filed, petitioner waived indictment and pleaded guilty to aiding and abetting the laundering of monetary instruments, in violation of 18 U.S.C. 1956(a)(1)(B)(i). A plea agreement provides that the United States will move to dismiss the indictment that is the subject of the instant certiorari petition. The case before the Court is not moot, however, because the government has not yet dismissed the indictment in this case and because petitioner has indicated that he would seek to withdraw his guilty plea if the Court granted certiorari in this case. The sentencing hearing in the money laundering case is set for December 31, 1992.

this Court itself applied a similar approach to a warrant that contained tainted evidence in *United States* v. *Karo*, 468 U.S. 705, 719-721 (1984). Petitioner acknowledges *Karo*, but argues (Pet. 10) that it is inconsistent with the suggestion in *Murray* that a different rule would apply "if information obtained during [the illegal] entry was presented to the Magistrate and affected his decision to issue the warrant." 487 U.S. at 542.

Whatever the merits of petitioner's argument, this petition is not an appropriate vehicle for considering it. Most obviously, as the case comes to the Court, the matter is interlocutory. Although the lack of finality does not affect the Court's jurisdiction, see Robert Stern et al., *Supreme Court Practice* § 2.2 (6th ed. 1986), the Court has noted that the interlocutory nature of a case makes it unsuitable for plenary review because of the possibility that the issue presented in the petition will not affect the outcome of the proceeding. See *id.* § 4.18. That concern is particularly relevant here, where petitioner already has pleaded guilty to related charges pursuant to a plea agreement calling for dismissal of the indictment in this case even if the Court denies review. See note 2, *supra*. Hence, a resolution in petitioner's favor of the question presented by the petition would affect petitioner only if (a) petitioner were able successfully to withdraw his guilty plea; (b) petitioner could not be convicted without the evidence obtained pursuant to the warrant; and (c) petitioner would have been convicted after a full trial with that evidence.

Even if the Court were inclined to review the issue at this time, the petition does not squarely present

the question urged by petitioner, because the unlawful search did not uncover any obviously incriminating evidence.[3] Hence, it is not at all clear that the evidence secured from the unlawful search could be said to have "affected [the magistrate's] decision to issue the warrant" within the meaning of *Murray*, 487 U.S. at 542. Accordingly, the decision to uphold the warrant is consistent with a fair construction of *Murray*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SIDNEY M. GLAZER
Attorney

DECEMBER 1992

---

[3] The only substantial facts in the warrant that were derived from the unlawful search were the facts that (1) petitioner was located inside the residence, (2) the woman at the residence lied about petitioner's presence, and (3) petitioner identified himself as having a name different from the name found on the identification papers in the Toyota. See Pet. App. 6a-7a (quoting the relevant portion of the warrant). Although those facts may be suspicious, they are not strongly suggestive of involvement with narcotics trafficking. The magistrate's conclusion that petitioner was involved with narcotics is much more likely to have rested on the preexisting evidence (which included, among other things, the ledger and the wallet that had an odor of narcotics).